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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1223

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

REPUBLIC COTTON MILLS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered on January 31, 1945, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 1–25)[1] are not reported.

[1] References (R. —) are to the Appendix to the claimant's principal brief in the Circuit Court of Appeals. References (B. —) are to the separate Appendix B to the Commissioner's brief in the Circuit Court of Appeals. References to the proceedings in the Circuit Court of Appeals are designated

The opinion of the Circuit Court of Appeals (C. C. A. 1–10) is reported in 147 F. 2d 278.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 31, 1945 (C. C. A. 10–11). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, on review of a decision of the Tax Court denying a claim for refund of processing taxes, the Circuit Court of Appeals erred in directing the Tax Court to treat one of claimant's three mills as a separate entity having a separate claim for purposes of determining the statutory margins, and of determining whether claimant bore the burden of the tax, when all the mills processed the same taxable commodity—cotton.

2. Even if the margins for Mill No. 3 should be computed separately, whether the court below erred in failing to hold that the Commissioner's evidence was sufficient to overcome the presumption that the taxpayer had borne the burden of the tax, and in directing the Tax Court, in effect, to allow a refund on the basis of the favorable margin alone.

(C. C. A. —). No references are made in this petition to Appendix B to the claimant's reply brief which is certified as part of the record in this case.

3. Even if the margins for Mills Nos. 1 and 2 should be separately computed, whether the Circuit Court of Appeals erred in setting aside the decision of the Tax Court and in directing it to reconsider evidence introduced by the claimant to rebut the presumption indicating that claimant did not bear the burden of the tax as to cotton processed in these mills.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the statute and regulation involved are set out in the Appendix, *infra,* pp. 27–33.

STATEMENT

This proceeding is based upon a claim for refund of amounts aggregating $435,340.73, paid as processing tax under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended, upon the first domestic processing of cotton (R. 2). The taxing provisions of that Act were held unconstitutional in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110, and Congress thereafter enacted the Revenue Act of 1936, Title VII of which authorizes the refund, subject to certain specific conditions and limitations, of amounts collected as tax under the Agricultural Adjustment Act.

This claimant is a South Carolina corporation, organized in 1909, with its principal place of business at Great Falls, in that State. During the effective period of the Agricultural Adjustment

Act, and for many years after and prior thereto, it was engaged in the manufacture of cloth from cotton, rayon, and silk. (R. 2–3.) As such it was liable for taxes on the cotton processed, but not on the rayon and silk, under the Agricultural Adjustment Act (R. 7). During the period from August 1, 1933, through March 31, 1935, the claimant reported and paid a total of $435,340.73 as processing tax, plus $53.61 interest (R. 3). On June 29, 1937, the claimant filed a claim, pursuant to the applicable provisions of the Revenue Act of 1936, for refund of $435,343.54 paid as processing tax. The claim was disallowed in full by the Commissioner by registered letter dated July 3, 1940, and on August 6, 1940, the claimant petitioned the Processing Tax Board of Review for a review of the Commissioner's action. (R. 3.)

This case was tried on the merits before a member of the Processing Tax Board of Review. Briefs had been filed, the presiding member of the Board had filed his recommended findings of fact and decision, exceptions to some of the recommended findings had been filed, and oral argument had before the full Board when the Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and its functions transferred to the Tax Court. At this stage of the proceeding the case was transferred to the Tax Court. The Tax Court made its findings of fact substantially as recommended by the

presiding member of the Board of Review, and entered its decision that the claimant is not entitled to recover any part of the processing tax paid. (R. 2, 35.)

The evidence introduced by the parties is voluminous, and the findings of fact made by the Tax Court are extensive and detailed (R. 2–23). They are substantially as follows:[2]

The claimant operated three mills at Great Falls, South Carolina, an unincorporated community of approximately 4,000 inhabitants and located some distance from any other town (R. 3). Mill No. 1 was constructed in 1911; Mill No. 2 in 1917; and Mill No. 3 in 1924. Mill No. 1 is about a quarter of a mile distant from Mill No. 2, and Mill No. 3 is three-quarters of a mile distant from each of the other mills. (R. 4.)

At all times material hereto the yarn used in claimant's Mills Nos. 1 and 2 was spun therein. Those mills were operated together as a single manufacturing unit with the same superintendent and operating organization. They consumed only carded cotton yarn and their production was limited to a few standard constructions of coarse cotton gray goods and certain special orders for closely related cloths, all in the print division of the cotton textile industry. Mill No. 3 was oper-

[2] Counsel for the claimant insisted before the Tax Court that findings be made whether or not material to the theory adopted by the Tax Court (R. 68).

ated separately from Mills Nos. 1 and 2. It had its own superintendent and operating organization; it maintained separate accounts, with the exception of accounts receivable and payable, mill village, power lines, etc.; and on occasions it maintained different hours of employment. It manufactured fine goods and specialties out of fine combed yarn separately from the manufacture of coarse goods in Mills Nos. 1 and 2. It manufactured at various times an all-cotton cloth, a cloth of mixed cotton and rayon, a cloth of mixed cotton and silk, an all-rayon cloth, and, to an insignificant extent, a cloth containing a mixture of silk and rayon. With the exception of one standard combed cotton cloth and one combed lawn, practically all the production of Mill No. 3 was specially styled. All the rayon and silk yarns were purchased, as was a small amount of cotton yarn, but most of the cotton yarn used by Mill No. 3 was spun in its own plant. (R. 4–5.)

In the sale of its goods the claimant pursued methods which were common to the cotton industry generally. Its cotton cloth was sold almost exclusively as gray goods through commission houses to large industrial houses or converters and finishers who in turn dealt with the cutting-up trade, the large department and chain stores, and other large consumers. During the tax period, claimant sold the products of Mills Nos. 1 and 2 through Cannon Mills, Incorporated, and

the products of Mill No. 3 through J. P. Stevens & Company, both of New York City. (R. 5.)

"The business conducted by the petitioner [claimant] was carried on and maintained as a single business venture" (R. 7).

During the period before and after the tax (August 1, 1931–July 31, 1933, and February–July, 1936, inclusive), sometimes referred to herein as the "base period", the claimant processed 14,354,862 units of the commodity (pounds of cotton) having a cost of $1,398,487.21 and a gross sales value of $4,418,641.43. The statutory "average margin" for the base period was $0.2103924 per unit (pound) of cotton processed. During the tax period (August 1, 1933–March 31, 1935) the claimant processed 10,364,230 units (pounds) of cotton having a cost of $1,341,182.86 and a gross sales value of $4,221,198.63 on which it paid processing taxes of $435,394.34. The statutory "margin" per unit of commodity (pound of cotton) processed during the tax period was $0.2358710 per pound. The "average margin" per unit for the tax period thus exceeded the "average margin" for the base period by $0.0254786 per pound, thus raising the statutory presumption that the claimant bore none of the burden of the tax. (R. 8.) If the margins are computed separately, the margin for the tax period is less than that of the base period for Mill

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No. 3 and greater than that of the base period for Mills Nos. 1 and 2 (R. 8).[3]

The tax levied under the Agricultural Adjustment Act upon the processing of cotton became effective August 1, 1933. For three or four months prior to the effective date of the tax, during which period the cotton trade anticipated the possibility of the ultimate levying of such a tax, it was customary for contracts of sale to carry what was known as a tax-to-be-added clause under which the purchaser agreed to pay, in addition to the contract price, any amount which "the seller is required to pay to the Federal Government on account of taxes or charges not now existing." (R. 8–9.) All of the claimant's contracts for the sale of its articles containing cotton, which were executed within several months prior to August 1, 1933, carried such a clause or a clause of similar import (R. 9). With respect to deliveries made on or after August 1, 1933, under contracts which had been made prior to that date, and which carried the tax-to-be-added clause, the claimant added to its invoices and collected as separate items, designated as processing tax, amounts aggregating $27,224.55. Of that amount, $11,221.15 was ap-

[3] The number of pounds processed during the tax period and the base period, the cost and gross sales value, the amount of processing tax paid, and the average margin per unit for the base period and the tax period, are set out separately for Mills Nos. 1 and 2 and for Mill No. 3 in the findings of the Tax Court (R. 8).

plicable to sales contracts which were completed by delivery of goods, the cotton content of which had been subjected to the floor stocks tax levied under the Agricultural Adjustment Act. The balance of $16,003.40 was applicable to sales contracts completed by delivery of goods, the cotton content of which had been subjected to the processing tax. Of this amount, $9,280.97 is attributable to the production of Mills Nos. 1 and 2, and $6,722.43 to Mill No. 3 production. (R. 8.)

The price on any contract carrying the above tax-to-be-added clause necessarily remained indeterminate until delivery had been completed because the rate of tax was not immediately known, because deliveries might be completed before imposition of the tax, and because some uncertainty existed as to the appropriate conversion factor which would represent tax on a pound of raw cotton converted to tax on a yard of completed goods. These conversion factors necessarily varied between mills and resulted in a certain amount of confusion. After these uncertainties had, to a certain extent, been removed by the imposition of the tax and the determination of the rate, selling agents representing the various mills undertook to revise the tax-to-be-added clause then generally in effect. The Association of Cotton Textile Merchants of New York joined in making a recommendation for a clause to the effect that the tax and labor clause then generally in use should

be discontinued as of August 1, 1933, "inasmuch as quotations will be based on existing conditions with respect to all manufacturing costs", and that "on any business, on and after August 1, prices be quoted and sales made to include the cotton processing tax of .0420 a pound as part of the cost of raw material". (R. 9, 10.) Clauses of an import similar to the above were generally and immediately adopted by the claimant, with respect to all its mills, and by the entire industry (R. 10).

On August 1, 1933, for the express purpose of shifting the burden of the processing tax, offering quotations on each of the standard constructions made by Mills Nos. 1 and 2 were very generally increased by adding to the basic quotations at which its goods had been sold in July, amounts varying from ¾¢ to 1¼¢, according to the amount of tax estimated to have been incurred with respect to a finished yard of each particular construction. The volume of sales at these prices was relatively small, although the claimant and its selling agents endeavored to effect sales at the new level of prices and thus to pass on the burden of the processing tax. (R. 10.)[4]

During the tax period and the four months immediately following (August 1, 1933, to July 31,

[4] A table setting forth in cents per yard the trend in prices during July and August, 1933, on sales made by the claimant, was set out in the recommended findings of the presiding member of the Board and incorporated in the Tax Court's findings by reference (R. 10, 33).

1935), there was no instance of a sale of any construction by Mills Nos. 1 and 2 at a price as high as the August 1, 1933, quotations. During that period, however, certain sales were made by the claimant at prices in excess of the prices received by it on sales made July 13–15, 1933, or the July 31, 1933, quotation (whichever was lower). The total amount which the claimant actually received on sales during this two-year period (August 1, 1933–July 31, 1935) exceeded by $38,852.06 the total amount which it would have received at the July 1933 scale of prices. (R.11–12.)

The claimant's labor and other manufacturing expenses were increased during the tax period as compared with the base period (R. 15). The cost of doing business (exclusive of commodity costs) per unit of the commodity processed for the tax period with respect to all three mills was $0.185037. The cost of doing business per unit of the commodity processed in respect of all three mills was greater by $0.0171654 for the tax period than for the base period. The average margin per unit of the commodity processed for all three mills, after adjustment for such increase in expenses, was $0.0083132 greater in the tax period than it was in the base period. (R. 20.)

With respect to Mills Nos. 1 and 2, the claimant's average total cost per pound of lint cotton processed, plus the cost of labor, direct expenses, and selling expenses, was $0.1239406 for the tax

period and $0.0930084 for the base period—an excess of $0.0309322 per pound for the tax period over the base period (R. 15–16). With respect to the cotton-content fabric produced by Mill No. 3, the claimant's average cost per pound of lint cotton processed, plus the cost of labor, direct expenses, purchased yarn (cotton, rayon, and silk), dyeing expense, and selling expense, was $0.42831929 for the tax period and $0.45885446 for the base period—a decrease of $0.03053517 for the tax period as compared with the base period (R. 20–21).

Claimant's Mills Nos. 1 and 2 originally were constructed and equipped for the manufacture of print cloths and carded broadcloths similar to those produced during the tax period, and at all times prior to that period these mills were exclusively engaged in the production of these and related constructions. Complete records of production and profits are not available for 1918 and prior years. For the entire period of fourteen calendar years immediately preceding the tax period (1919–1932, inclusive), the average manufacturing profit for Mills Nos. 1 and 2 was equivalent to $0.05558306 per lint pound of cotton processed. In four of the twenty months of the tax period, the monthly margins for Mills Nos. 1 and 2 were adequate to yield the claimant a manufacturing profit of $0.05558306 per lint pound of cotton processed. No processing was done in one month of the tax period, and in the

other fifteen months of the tax period, the monthly margins were inadequate, at least to the extent of $172,923.88, to yield the claimant a profit equal to $0.05558306 per lint pound of cotton processed. (R. 12–13.)

Mill No. 3 was operated at a loss for 1930–1935, inclusive (which includes the tax period), with the exception of 1933. During 1934 and 1935, its operations were so costly that the board of directors considered the advisability of an expenditure of $500,000 or more to change the character of its entire production. Notwithstanding the effort to offset losses resulting from the manufacture of cotton content fabrics by entering the all-rayon fabric field (to which certain looms were adapted in 1933—the year of the profit), the claimant was unable to show a net profit for the twenty-month tax period. Deducting from the statutory margins all monthly costs and expenses relating to the production and sale of all goods produced in Mill No. 3, the operations of Mill No. 3 showed a loss of $89,708.99 for the tax period in the production of cotton content fabrics and a profit of $67,749.12 in the production of non-cotton fabrics, or a loss of $21,959.87 for the tax period on all production of Mill No. 3. (R. 18–19.)

During the statutory base period before and after the tax, the claimant operated at a net loss, as to all of its mills combined, totaling $93,183.

During the tax period it realized a net operating profit of $274,637.89. (R. 23.)

The Tax Court held (R. 23–25) that the claimant's business conducted through Mills Nos. 1, 2 and 3 was a single entity, that the statutory margins for the tax period and the base period, computed as a whole, were in favor of the Government, and, on a consideration of all the evidence, that the claimant had failed to prove that it bore the burden of any processing taxes paid. It sustained the action of the Commissioner in denying any refund of tax.

The Circuit Court of Appeals reversed the decision of the Tax Court and directed it to consider Mill No. 3 as a separate business from Mills Nos. 1 and 2 for all purposes, including the computation of the statutory marginal presumption, and as if a separate claim had been filed by Mill No. 3. It directed the Tax Court to reconsider and reweigh the facts as to Mill No. 3 indicating that in its opinion there was a basis for refund of tax. It also directed the Tax Court to separately reconsider all the evidence with respect to Mills Nos. 1 and 2, despite a favorable marginal computation in favor of the Government, and directed it to redetermine whether the claimant bore the burden of a part of the tax which was paid. (C. C. A. 1–10.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the average marginal computations provided by Section 907 (a) of the Revenue Act of 1936, upon which is based the statutory presumption as to whether the claimant bore the burden of the tax paid, should be computed separately for Mill No. 3 and Mills Nos. 1 and 2 where one basic commodity—cotton—was processed by all three mills.

2. In directing the Tax Court to consider the claim of Mill No. 3 separately from Mills Nos. 1 and 2 where one joint claim for refund of processing taxes paid was filed by claimant for all three mills which processed one basic commodity—cotton.

3. In holding that the Tax Court was required, as a matter of law, to consider Mill No. 3 and its operations separately and apart from Mills Nos. 1 and 2 and to reweigh the evidence accordingly.

4. In directing the Tax Court to reconsider and reweigh the evidence in the case of Mills Nos. 1 and 2 to determine whether any part of the processing tax paid had been borne by claimant, despite the statutory margins favorable to the Government and affirmative proof by the Commissioner that the sales contracts contained clauses pursuant to which the tax was passed on to purchasers.

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5. In setting aside the finding of the Tax Court that the claimant "did not bear the burden of any part of the amount it paid as tax with respect to its processing of cotton" despite the evidentiary support in the record for that finding.

6. In weighing the evidence and in making findings of fact based thereon contrary to the findings of the Tax Court.

7. In substituting its view of the facts for that of the Tax Court.

8. In usurping the functions of the Tax Court and in substance directing it, on reconsideration of the evidence, to allow a refund of taxes paid.

9. In reversing the decision and judgment of the Tax Court and in remanding the case for further proceedings.

REASONS FOR GRANTING THE WRIT

After the taxing provisions of the Agricultural Adjustment Act were declared unconstitutional in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110, Congress enacted Title VII of the Revenue Act of 1936, governing the refund of amounts so collected. Section 902 (Appendix, *infra,* pp. 27–28) conditions the refund of any amount upon the taxpayer's establishing that he bore the burden of the tax and did not shift it, directly or indirectly, to others. The power of Congress to impose such conditions upon the right to recover taxes ille-

gally collected was sustained in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, rehearing denied, 302 U. S. 772. Cf. *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

Section 907 of the 1936 Act (Appendix, *infra*, pp. 28–33) prescribes a formula for determining the extent to which a taxpayer shall be presumed to have borne or shifted the tax burden. Subsection (a) of Section 907 provides that it shall be *prima facie* evidence that the burden of the tax was borne by the claimant to the extent that the "average margin per unit of the commodity processed" was lower during the tax period than the "average margin" during the period before and after the tax; and if the "average margin" during the tax period was not lower "it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others".

Section 907 (e) provides that either the taxpayer or the Commissioner may rebut the presumption established by Section 907 (a) "by proof of the actual extent to which the claimant shifted to others the burden of the processing tax." Those provisions were considered by this Court in *Webre Steib Co.* v. *Commissioner*, No. 148, decided February 12, 1945.

1. The decision below runs counter both to the plain words of the statute and to its underlying purpose which is to prevent unjust enrichment

of a claimant through the recovery of processing taxes. The statute plainly provides for the computation of one average margin for the base period and one average margin for the tax period with respect to each commodity on which a processing tax was paid by the claimant. Subsection (b) of Section 907 defines the "average margin" and prescribes a method for computing the average margin on a monthly basis for the tax period and for the period before and after the tax. Monthly margins for the tax period are computed by deducting from the "gross sales value" of all articles processed during the month the cost of the commodity processed plus the processing tax, and dividing the result by the total number of units of commodity processed during such month. Monthly margins for the period before and after the tax are computed in a similar manner except that there is no processing tax included. The statutory "average margin" for each period is computed in the same manner as the monthly margins, "using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during each period." The "commodity processed" by this claimant, and upon which the tax in question was paid, was cotton.[5]

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[5] Section 11 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended (7 U. S. C. 611); Section 913 (c) of the Revenue Act of 1936 (7 U. S. C. 655).

Clearly there is nothing in the statutory language to suggest that separate margins may be computed for mills owned by the same taxpayer which process commodities subject to the same tax. Indeed, the decision below creates an anomalous situation: under Section 907 (e) (2), (Appendix, *infra,* pp. 32–33), a means is provided whereby a shift in the tax burden through dealings in a *non-taxed* product will prevent recovery; but in a case like that at bar in which only one commodity, and that *subject to the tax,* is involved, the necessary result of the ruling below is that the burden of the tax on Mill No. 3 processing, for instance, could be shifted through Mills Nos. 1 and 2 sales, and that the taxpayer would nevertheless obtain a refund.

The parties stipulated, and the Tax Court found, that the claimant's statutory "average margin" for the tax period was greater than its statutory "average margin" for the base period by $0.0254786 per pound (R. 8). Thus, by virtue of the provisions of Section 907 of the 1936 Act, the claimant is presumed to have shifted to others the entire amount of the processing tax paid by it, and the burden was upon it to prove the "actual extent" to which it bore the tax. This burden of proof remained upon the claimant throughout the trial. *Webre Steib Co.* v. *Commissioner, supra,* slip opinion, pp. 5–6.

2. The decision of the Circuit Court of Appeals, that Mill No. 3 and its operations must be considered separate and apart from Mills Nos. 1 and 2 in computing the statutory marginal presumption under Section 907 (a), is in conflict, in principle, with the decisions of the Circuit Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co.* v. *Commissioner,* 139 F. 2d 47 (C. C. A. 6th), and *Colonial Milling Co.* v. *Commissioner,* 132 F. 2d 505 (C. C. A. 6th), certiorari denied, 318 U. S. 780. In the *Tennessee Coal* case, *supra,* p. 50, it was held that under comparable provisions of the unjust enrichment tax statute—"Aggregate, and not individual sales, are the criteria for computing the margin for the base period and for the tax period, as well as for the computation of the tax" regardless of the type or grade of the commodity. And in the *Colonial Milling* case, *supra,* the court held that under Section 907 (a) consideration must be given to all transactions of the entire period as a whole. That is exactly what the Tax Court did in the instant case; it combined the figures for all three mills to determine the statutory over-all marginal presumption against the claimant and in favor of the Government for the single commodity—cotton—processed by the mills.

The Circuit Court of Appeals relied upon *I. L. Walker Tobacco Co.* v. *Commissioner,* 129 F. 2d 464, decided by the Circuit Court of Appeals for

the Sixth Circuit[6] prior to its decision in the *Tennessee Coal* and *Colonial Milling* cases, *supra*. We do not believe that that case was correctly decided, especially in the light of the fact that the Processing Tax Board had not computed separate margins.[7] But, in any event, that case involved a commodity taking the form of two different grades of tobacco—burley tobacco for smoking and scrap tobacco for chewing. Each of these grades bore a different rate of tax,[8] while all cotton processed in the instant case was subjected to the same rate of tax.

The tax here was levied on the processing of cotton regardless of grade or type, and selected and segregated sales cannot properly be used to show that the tax burden was borne by Mill No. 3 since Section 907 (b) (3) (Appendix, *infra*, p. 29) expressly prohibits any separation or segregation of sales. This Section provides that the average

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[6] No petition for a writ of certiorari was filed in that case, chiefly for the reason that separate computations still showed margins favorable to the Government.

[7] In the *Walker* case as in this case, the circuit courts of appeals' decisions run counter to Article 602 of Treasury Regulations 96 promulgated under Section 903 of the Revenue Act of 1936 (7 U. S. C. 645) (Appendix, *infra*, p. 33), which provides that only one claim for the refund of processing taxes paid on each commodity may be filed. Here only one claim was filed and the court below erred, we submit, in directing the Tax Court to consider the claim of Mill No. 3 separately from the claim of Mills Nos. 1 and 2 (C. C. A. 8).

[8] T. D. 4395, XII–2 Cum. Bull. 466 (1933); T. D. 4494, XIII–2 Cum. Bull. 500 (1934).

margin for each period shall be ascertained by using total gross sales value, total cost of the commodity processed, total processing tax paid, and total units of the commodity processed. The statute clearly contemplates one marginal computation, one presumption, and a decision based on the aggregate of all transactions relating to the one commodity processed.

3. If, however, the statute could conceivably be construed as permitting the computation of separate margins for separate mills in an appropriate case, it was for the Tax Court to decide whether the circumstances here justify that procedure, and the court below erred in reversing the Tax Court's determination. *Dobson* v. *Commissioner,* 320 U. S. 489, 501–502, rehearing denied, 321 U. S. 231. The Tax Court found (R. 7) that the claimant's milling business "was carried on and maintained as a single business venture" and the Circuit Court of Appeals expressed no disagreement. That finding should have been deemed dispositive.

4. In addition to the marginal presumption determined by the Tax Court in favor of the Government under Section 907 (a), the Tax Court found (R. 25), on a consideration "of all the evidence" which was voluminous, that the claimant had not shown that it bore the burden of the processing taxes or proved that the taxes were not passed on to its customers.

During the tax period the claimant realized a net operating profit of $274,637.89 while it operated at a net loss of $93,183 during the base period (R. 23; Ex. AY). The fact that the claimant's average margin for the tax period, even after adjustment to reflect differences in labor and other expenses, exceeded its average margin for the period before and after the tax (R. 20) is persuasive evidence that the burden of the tax was shifted.

Moreover, the Commissioner introduced evidence to show that the claimant had actually passed the tax on to others (R. 8–11; B. 1–20, 28–32, 36, 39, 41, 47, 53–55). This consisted of claimant's concession that it intended and tried to pass the tax on (B. 15–16); correspondence between the claimant and its selling agents with reference to including the tax in the cost of goods sold (B. 15–19, 62; Exs. J, AL, AO); various contracts and sales notes carrying clauses showing that the price of goods sold included the tax (B. 30–31, 53–55); the use of the "up and down" clause in sales contracts (B. 1–6), which provided that if the tax rate was revised upward the purchaser would pay the processor the difference between the existing rate and the increased rate, but that if the rate was revised downward the processor would pay the purchaser the difference; and the use of the "Charlotte Clause" on claimant's contracts (B. 9), providing that if the Agri-

cultural Adjustment Act was declared unconstitutional the processor would reimburse the purchaser for the amount of processing tax on the cotton content of the finished garment (B. 8–10); Exs. AR, AZ, L, C, M). After the Act was declared unconstitutional, the claimant actually made refunds to its purchasers for the amount imposed but not paid as processing tax in the selling price of the article (B. 9–14, 32, 36; Exs. D, E, F, G, H, AK).

The "up and down" clause was admittedly used in all of the claimant's contracts until about the time the Agricultural Adjustment Act was declared unconstitutional. That clause and its effect is discussed in *United States* v. *Kansas Flour Corp.*, 314 U. S. 212, 215, and *United States* v. *Standard Rice Co.*, 323 U. S. 106, 109–110. The employment of such clauses in contracts of sale is a clear indication that the tax was passed on to others and was not borne by the claimant, and is tangible proof of the fact that the claimant was collecting the processing tax from others by means of a flat selling price which included the tax. The Circuit Court of Appeals did not comment on any of the above evidence but ignored it completely despite the findings of the Tax Court (R. 8–10). These factors must have been considered by the Tax Court in making its ultimate finding of fact (R. 23) that the claimant did not bear the burden of the processing taxes paid.

There is ample evidence in the record to support that finding and it is clear from the Tax Court's opinion that it considered "all the evidence" and did not rest on the marginal presumption alone (R. 25). This evidence not only reinforces the presumption as to Mills Nos. 1 and 2, but serves to overcome any favorable presumption as to Mill No. 3. *Webre Steib Co.* v. *Commissioner, supra.*

5. The Circuit Court of Appeals has usurped the functions of the Tax Court in weighing the evidence and in substituting its judgment of the facts for that of the Tax Court. This results in a conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Snyder* v. *Commissioner,* decided April 2, 1945 (1945 C. C. H., par. 9245), an unjust enrichment tax case, and is contrary to repeated admonitions of this Court in *Dobson* v. *Commissioner,* 320 U. S. 489; *Equitable Society* v. *Commissioner,* 321 U. S. 560, 563; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119; *Commissioner* v. *Court Holding Co.,* No. 581, decided March 12, 1945; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 294; and *Helvering* v. *Kehoe,* 309 U. S. 277, 279. To weigh the evidence and to choose between conflicting inferences is the function of the Tax Court. *Wilmington Co.* v. *Helvering,* 316 U. S. 164, 168; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40; *Hulburd* v. *Commissioner,* 296 U. S.

300, 306. This Court should exercise its supervisory powers to direct the Circuit Court of Appeals to apply this principle to this case. *Commissioner* v. *Wemyss,* No. 629, March 5, 1945.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Acting Solicitor General.

APRIL 1945.